Semesta Insurance Underwriting Agency Sdn Bhd v Koperasi Insurance (M) Bhd and another suit

HIGH COURT (KUALA LUMPUR) — SUIT NOS D5–22–225 OF 1995 AND D4–22–224 OF 1995
RAMLY ALI J
24 FEBRUARY 2010

Companies and Corporations — Separate legal entity — Action commenced by corporate nominee, shareholder and director for damages suffered by company — Whether Christie as shareholder and director had locus standi to commence action for damage suffered by company — Whether plaintiff had independent cause of action separate and distinct from Semesta

Tort — Defamation — Libel — Publication — Whether there was evidence of publication of winding up petition in any newspaper — Whether advertising of winding up petition defamatory of Semesta — Privilege — Whether advertisement protected by absolute privilege — Whether Semesta entitled to general damages of RM15m for libel

Tort — Malicious prosecution — Mandatory requirements for claim of malicious prosecution — Whether institution of action and winding up proceedings by Koperasi Insurances (M) Bhd without reasonable and probable cause — Whether Semesta could recover general damages for malicious prosecution

Tort — Negligence — Duty of care — Koperasi Insurances (M) Bhd ('MCIS') instituted action against Semesta for recovery of debts — Relationship between parties — Whether one litigant owed a duty of care to another — Whether MCIS owed duty of care to Semesta as its agent — Breach of duty — Whether MCIS recklessly or negligently caused Semesta's underwriting agency licence not to be renewed — Whether Semesta and shareholder/director proven damages

On 30 March 1989 the Koperasi Insurance (M) Bhd ('MCIS'), a co-operative entity carrying on the business of insurers, commenced a sessions court action against Semesta Insurance Underwriting Agency Sdn Bhd ('Semesta'), a private limited company carrying on business as an insurance agent and consultant, for alleged debts of RM84,107.76 ('the debt') owed by Semesta to MCIS. On 16 May 1989, MCIS obtained a judgment in default against Semesta. In the meantime, the shareholders of Semesta had sold their shares in the company to one Santhanam Christie s/o Lourdes ('Christie') and two others. The terms of

the sale and purchase agreement for the shares in Semesta stated that a sum of RM80,817.60, was due and owing to Semesta. On or about 27 September 1990, Semesta assigned the debt of RM80,817.60 to MCIS but the deed of assignment, which evidenced the said assignment of the debt, was not stamped. When Semesta's underwriting agency licence expired on 31 December 1989, MCIS circulated an internal memo ('the internal memo') stating its intention to cease business with Semesta. However, despite this internal memo MCIS continued carrying on business with Semesta until October 1990. On 30 September 1991, MCIS issued a notice pursuant to s 218 of the Companies Act 1965 on Semesta and when the latter failed to pay its debt within 21 days from the service of the said demand MCIS proceeded to commence winding up proceedings. When the said judgment in default was later set aside due to irregular service, the sessions court action initiated by MCIS was withdrawn with liberty to file afresh. In the light of this, the winding up proceedings, which was based upon the judgment in default, was also dismissed. Semesta then commenced the present suit against MCIS, inter alia, for negligence in commencing the sessions court action and the winding up petition against it; negligence for failing to provide Semesta with the letter of release stating that Semesta was not indebted to MCIS to enable it to apply to Persatuan Insurans Am Malaysia ('PIAM') for a renewal of its underwriting agency licence; and negligence for allegedly providing Semesta with the wrong set of forms for the renewal of Semesta's underwriting agency licence. It was also Semesta's case that the said judgment in default obtained by MCIS was obtained maliciously and unreasonably and amounted to malicious prosecution. By this action Semesta sought special damages of RM300,000 a year as loss of profits suffered by it from 30 March 1989 together with interest, general damages for libel amounting to RM15m and interest thereon, punitive and exemplary damages of RM5m with interest thereon, general damages for malicious prosecution with interest thereon and costs. At the same time Christie also commenced a suit against MCIS in his personal capacity as a corporate nominee, shareholder and director wherein he claimed damages allegedly suffered by Semesta. As both suits were almost identical they were consolidated.

Held, dismissing both suits with costs:

(1) The relationship between Semesta and MCIS, in so far as the consolidated suit was concerned, was that of litigants involved in a court proceedings. It is settled law that there was no duty of care owed by one litigant to another as to the manner in which the litigation is conducted, whether in regard to service of process or in regard to any other step in the proceedings. The safeguards against impropriety are to be found in the rules and procedures that control the litigation and not in tort. Thus, damages suffered by litigants caused by the legal process instituted by another litigant are not remediable in an action based on negligence. It is also a well established principle that a person is not liable in damages for

putting the law in motion unless he proceeds maliciously and without reasonable and probable cause for anticipating success. In the present case there was no evidence adduced by Semesta to establish an act of malicious prosecution or an abuse of the process of court on the part of MCIS in commencing the sessions court action against it for the alleged debt. As such, Semesta had failed to fulfill the existence of a duty of care, which was the first requirement for an action founded on negligence, and its claim against MCIS could be dismissed at this stage (see paras 26–27, 30 & 32–33).

(2) Even assuming the existence of a duty of care owed by MCIS to Semesta, there had been no breach of that duty of care. The court found that there was no evidence to support Semesta's allegation of wrongful termination of its agency by MCIS. It was also found that even if an application for an underwriting agency was made by Semesta, the prospects of that application being successful were unlikely, through no fault of MCIS failing to provide Semesta the letter of release. Further, Semesta was unable to provide evidence of any provision of law that imposed a duty on MCIS as its principal to provide it with the correct forms for application for renewal of insurance agency licences (see paras 34–35, 40 & 47).

(3) The fact that the judgment in default and the winding up proceedings were later set aside did not mean that the institution of the action and proceedings were without reasonable and probable cause. At the material time MCIS had an honest belief founded upon reasonable grounds that Semesta was indebted to it and thus had a valid claim against Semesta for the recovery of the debt. When the judgment sum was not paid, MCIS was again well within its rights to proceed with execution proceedings, which took the form of winding up proceedings in this case. Premised on the facts and the law, the mandatory requirements upon which a claim for malicious prosecution was founded were not apparent in the instant case. The mere recital of the court proceedings before the sessions court, in so far as the winding up petition was concerned, did not amount to a prima facie plea of malice and thus Semesta's claim for malicious prosecution against MCIS must fail (see paras 63, 66 & 72–73).

(4) It is settled law that there must be publication for a cause of action in libel to be maintained but Semesta was unable to provide any evidence of publication of the winding up petition in any newspaper. Even if the winding up petition was duly advertised in the newspaper it was not defamatory of Semesta, as the advertisement of the winding up petition was a mandatory requirement under r 19(b) of the Companies (Winding-Up) Rules 1972 and was therefore absolutely privileged. Thus Semesta's claim premised on a cause of action in defamation was devoid of merit and the issue of damages suffered under this cause of action did not arise (see paras 76, 79 & 83–84).

(5) The law is trite that a company is a totally separate and distinct entity to that of its directors and shareholders and that when a company incurs a contractual obligation or a liability in tort, that obligation or liability is that of the company and not of its members or officers. As such, Christie could not put forward a claim in his personal capacity as shareholder and director for damage allegedly suffered by Semesta and on this basis alone, Semesta's claim for negligence fails in its entirety. Further, in the present case, Christie's pleaded claim clearly showed that the alleged negligence committed by MCIS was in relation to Semesta's interest and not his personal interest. Thus Christie lacked standing to sue and his claim against MCIS must also fail (see paras 85–86, 89, 92 & 94–95).

(6) On the balance of probabilities Semesta as well as Christie had failed to adduce sufficient evidence to support their claims for loss of profits. The actuaries report relied upon by Semesta was based on the unrealistic assumption that the commission earnings in 1990 would continue unchanged and on this point alone the court could disregard the report as a whole. On the other hand the actuaries report tendered by MCIS was found to set out a more realistic projection by taking into account all the relevant factors and more importantly it was based on MCIS's premium growth (see paras 105, 111 & 115).

(7) In the present case Semesta and Christie could not justify seeking an award for punitive and exemplary damages and their claim for such damages had to fail (see para 124).

[Bahasa Malaysia summary

Pada 30 Mac 1989 Koperasi Insurance (M) Bhd ('MCIS'), sebuah entiti koperasi yang menjalankan perniagaan insurans, memulakan tindakan mahkamah sesyen terhadap Semesta Insurance Underwriting Agency Sdn Bhd ('Semesta'), sebuah syarikat sendirian berhad yang menjalankan perniagaan sebagai ejen dan perunding insurans, untuk hutang yang didakwa sebanyak RM84,107.76 ('hutang tersebut') yang dihutang oleh Semesta kepada MCIS. Pada 16 Mei 1989, MCIS memperoleh penghakiman ingkar terhadap Semesta. Sementara itu, pemegang saham Semesta telah menjual saham-saham mereka di dalam syarikat tersebut kepada seorang yang bernama Santhanam Christie s/o Lourdes ('Christie') dan dua yang lain. Terma-terma perjanjian jual beli untuk saham dalam Semesta menyatakan bahawa sejumlah RM80,817.60, masih tertunggak dan terhutang kepada Semesta. Pada atau lebih kurang 27 September 1990, Semesta menyerah hak hutang RM80,817.60 kepada MCIS tetapi surat ikatan penyerahhakan, yang membuktikan penyerahhakan hutang tersebut, tidak disetem. Apabila lesen agensi penaja jamin Semesta luput pada 31 Disember 1989, MCIS mengedarkan sebuah memo dalaman ('memo') menyatakan niatnya untuk menghentikan perniagaan dengan Semesta. Walau bagaimanapun, walaupun dengan memo tersebut MCIS meneruskan perniagaannya dengan Semesta

sehingga Oktober 1990. Pada 30 September 1991, MCIS mengeluarkan notis berikutan s 218 Akta Syarikat 1965 terhadap Semesta dan apabila Semesta gagal membayar hutangnya dalam tempoh 21 hari dari tarikh penyerahan tuntutan tersebut, MCIS meneruskan untuk memulakan prosiding penggulungan, Apabila penghakiman ingkar tersebut kemudiannya diketepikan disebabkan oleh penyerahan yang cacat, tindakan mahkamah sesyen yang dimulakan oleh MCIS ditarik balik dengan kebebasan untuk memfailkan semula. Atas dasar ini, prosiding penggulungan, yang berdasarkan kepada penghakiman ingkar juga ditolak. Semesta kemudian memulakan guaman ini terhadap MCIS, antara lain, untuk kecuaian dalam memulakan tindakan mahkamah sesyen dan petisyen penggulungan terhadapnya; kecuaian kerana gagal untuk memberikan Semesta surat pelepasan menyatakan Semesta tidak berhutang kepada MCIS untuk membolehkannya memohon kepada Persatuan Insurans Am Malaysia ('PIAM') untuk pembaharuan lesen agensi penaja jaminnya; dan kecuaian kerana didakwa memberikan Semesta set borang yang salah untuk membaharui lesen agensi penaja jaminnya. Ia juga adalah kes Semesta bahawa penghakiman ingkar yang didakwa diperoleh oleh MCIS adalah diperoleh secara niat jahat dan tidak munasabah dan merupakan pendakwaan dengan niat jahat. Melalui tindakan ini Semesta memohon ganti rugi khas sebanyak RM30,000 setahun bagi kerugian keuntungan yang dialaminya dari 30 Mac 1989 bersama dengan faedah, ganti rugi am untuk libel berjumlah RM15 juta dan faedah, ganti rugi punitif dan teladan berjumlah RM5 juta dengan faedah, ganti rugi am untuk pendakwaan dengan niat jahat dengan faedah dan kos. Pada masa yang sama Christie juga memulakan guaman terhadap MCIS dalam kapasiti peribadinya sebagai wakil korporat, pemegang saham dan pengarah di mana dia menuntut kerugian yang didakwa dialami oleh Semesta. Oleh kerana kedua-dua guaman adalah hampir serupa, ianya disatukan.

Diputuskan, menolak kedua-dua guaman dengan kos:

(1) Hubungan di antara Semesta dan MCIS, setakat yang berkaitan dengan guaman yang disatukan tersebut, adalah berkaitan dengan litigan yang terlibat dalam prosiding mahkamah. Ia adalah undang-undang matan bahawa tidak ada kewajipan berjaga-jaga oleh seorang litigan terhadap seorang lagi berkaitan mana litigasi dijalankan, sama ada berkenaan dengan penyerahan proses atau berkenaan mana-mana langkah dalam prosiding. Perlindungan terhadap kesilapan boleh didapati di dalam peraturan dan prosedur yang mengawal litigasi dan bukan dalam tort. Oleh demikian kerugian yang dialami oleh litigan disebabkan oleh proses undang-undang yang dimulakan oleh seorang lagi litigan tidak boleh diremedi di dalam tindakan yang berdasarkan kepada kecuaian. Ia juga adalah prinsip matan bahawa seseorang tidak bertanggungjawab terhadap kerugian kerana memulakan tindakan undang-undang kecuali dia meneruskan dengan niat jahat dan tanpa sebab munasabah atau

kemungkinan untuk mengharapkan kemenangan. Di dalam kes ini tidak ada keterangan yang dikemukakan oleh Semesta untuk membuktikan suatu tindakan pendakwaan dengan niat jahat atau penyalahgunaan proses mahkamah pada pihak MCIS dalam memulakan tindakan mahkamah sesyen terhadapnya bagi hutang tersebut. Oleh demikian, semesta telah gagal untuk memenuhi kewujudan kewajipan berjaga-jaga yang merupakan keperluan pertama untuk tindakan yang berasaskan kepada kecuaian, dan tuntutannya terhadap MCIS boleh ditolak pada peringkat ini (lihat perenggan 26–27, 30 & 32–33).

(2) Walaupun kewajipan berjaga-jaga dianggap wujud oleh MCIS terhadap Semesta, tidak ada kemungkiran kewajipan berjaga-jaga tersebut. Mahkamah mendapati bahawa tidak ada keterangan untuk menyokong dakwaan Semesta mengenai penamatan salah agensinya oleh MCIS. Ia juga didapati bahawa walaupun suatu permohonan untuk agensi penaja jamin telah dibuat oleh Semesta, prospek permohonan tersebut berjaya adalah tidak mungkin, bukan disebabkan oleh kesalahan MCIS gagal memberikan surat pelepasan. Selanjutnya, Semesta tidak boleh memberikan keterangan tentang apa-apa peruntukan undang-undang yang meletakkan kewajipan pada MCIS sebagai prinsipal untuk memberikannya borang yang betul untuk permohonan pembaharuan lesen agensi insurans (lihat perenggan 34–35, 40 & 47).

(3) Fakta bahawa penghakiman ingkar dan prosiding penggulungan tersebut telah kemudiannya diketepikan tidak bermaksud bahawa permulaan tindakan dan prosiding tersebut adalah tanpa alasan yang munasabah dan berkemungkinan. Pada masa material MCIS mempercayai secara jujur berasaskan kepada alasan yang munasabah bahawa Semesta berhutang kepadanya dan oleh itu mempunyai tuntutan yang sah terhadap Semesta untuk pengembalian semula hutang. Apabila jumlah hutang tidak dibayar, MCIS sekali lagi dalam rangkuman haknya untuk meneruskan dengan prosiding pelaksanaan, yang mengambil bentuk prosiding penggulungan dalam kes ini. Berdasarkan kepada fakta dan undang-undang, keperluan mandatori di atas mana tuntutan untuk pendakwaan niat jahat telah diasaskan tidak jelas dalam kes ini. Sebutan permulaan semata-mata, prosiding mahkamah di mahkamah sesyen, setakat yang berkaitan dengan petisyen penggulungan, tidak bermaksud pli niat jahat prima facie dan oleh itu tuntutan Semesta untuk pendakwaan dengan niat jahat terhadap MCIS mesti gagal (lihat perenggan 63, 66 & 72–73).

(4) Ia adalah undang-undang matan bahawa mesti ada penerbitan untuk kausa tindakan dalam libel tetapi Semesta gagal memberikan apa-apa keterangan mengenai penerbitan petisyen penggulungan di dalam mana-mana akhbar. Walaupun petisyen penggulungan tersebut diiklankan di dalam surat khabar ia bukan fitnah mengenai Semesta,

kerana iklan tentang petisyen penggulungan adalah keperluan mandatori di bawah k 19(b) Kaedah-Kaedah (Penggulungan) Syarikat 1972 dan oleh itu mempunyai keistimewaan mutlak. Oleh itu, tuntutan Semesta berasaskan kepada kausa tindakan fitnah adalah tidak bermerit dan isu kerugian yang dialami di bawah kausa tindakan ini tidak timbul (lihat perenggan 76, 79 & 83–84).

(5) Undang-undang adalah matan bahawa sesebuah syarikat adalah entiti yang berasingan dan berbeza sama sekali termasuk pengarah-pengarahnya, pemegang-pemegang sahamnya dan apabila syarikat tersebut menanggung obligasi atau liabiliti di dalam tort, obligasi atau liabiliti adalah oleh syarikat dan bukan ahli-ahlinya atau pegawai-pegawainya. Oleh itu, Christie tidak boleh mengemukakan tuntutan di dalam kapasiti peribadinya sebagai pemegang saham dan pengarah untuk kerugian yang didakwa dialami oleh Semesta dan atas dasar ini, tuntutan Semesta untuk kecuaian gagal secara keseluruhannya. Selanjutnya, di dalam kes ini, tuntutan Christie jelas menunjukkan bahawa kecuaian yang didakwa dilakukan oleh MCIS adalah berkaitan dengan kepentingan Semesta dan bukan kepentingan peribadinya. Oleh demikian Christie tiada hak untuk menyaman dan tuntutannya terhadap MCIS seharusnya gagal (lihat perenggan 85–86, 89, 92 & 94–95).

(6) Di atas imbangan kebarangkalian Semesta dan juga Christie telah gagal mengemukakan keterangan yang mencukupi untuk menyokong tuntutan mereka untuk kehilangan keuntungan. Laporan aktuari yang disandarkan oleh Semesta adalah berdasarkan kepada anggapan yang tidak realistik bahawa pendapatan komisen dalam 1990 akan berterusan tanpa perubahan dan atas poin ini sahaja mahkamah boleh tidak mengambil kira laporan tersebut secara keseluruhannya. Sebaliknya, laporan aktuari yang dikemukakan oleh MCIS didapati menyatakan unjuran yang lebih realistik dengan mengambil kira kesemua faktor-faktor yang relevan dan lebih penting lagi ia berdasarkan kepada perkembangan premium MCIS (lihat perenggan 105, 111 & 115).

(7) Di dalam kes ini Semesta dan Christie tidak boleh menjustifikasi permohonan award untuk ganti rugi punitif dan teladan dan tuntutan mereka untuk ganti rugi tersebut sewajarnya gagal (lihat perenggan 124).]

Notes

For cases on duty of care, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 963–1011.

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 369–527.

For cases on malicious prosecution generally, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 688–705.

For cases on separate legal entity generally, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 739–783.

Cases referred to

Abrath v The North Eastern Railway Company (1883) 11 QBD 440, CA (refd)
Al-Kandari v JR Brown & Co (a firm) [1988] 1 All ER 833; [1988] QB 665, CA (refd)
Anne Lim Keng See v The News Straits Time Press (M) Bhd & Anor [2003] 2 CLJ 565, HC (refd)
Aron Salomon (Pauper) v A Salomon and Company, Limited [1897] AC 22, HL (refd)
Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esrue Osman & Ors [1987] 1 MLJ 502, HC (refd)
Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76, SC (refd)
Blyth v Birmingham Water Works Co (1856) 11 Exch 781 (refd)
Bonham-Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177, KBD (refd)
Burr v Smith and others [1909] 2 KB 306, CA (refd)
Business Computers International Ltd v Registrar of Companies and others [1987] 3 WLR 1134, Ch D (refd)
Cassell & Co Ltd v Broome and another [1972] 1 All ER 801, HL (refd)
Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352, HC (refd)
Chop Chye Hin Chong v Ng Yeok Seng [1934] MLJ 265 (refd)
Customs and Excise Commissioners v Barclays Bank plc [2007] 1 AC 181, HL (refd)
Elguzouli-Daf v Comr of Police of the Metropolis and another; McBrearty v Ministry of Defence and others [1995] 1 All ER 833, CA (refd)
Foss v Harbottle (1843) 2 Hare 461 (refd)
Herniman v Smith [1938] AC 305, HL (refd)
Hicks v Faulkner (1878) 8 QBD 167, DC (refd)
John v Dharmaratnam [1962] MLJ 187, CA (refd)
Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1, HL (refd)
Koo Hock Chum & Anor v United Overseas Bank (M) Bhd [2009] 2 CLJ 331, CA (refd)
Lim Chee Kuo v The Pacific Bank Bhd [1997] MLJU 472; [1999] 1 CLJ 270, HC (refd)
Lincoln v Daniels [1962] 1 QB 237, CA (refd)
M'Alister (or Donoghue) (Pauper) v Stevenson [1932] AC 562, HL (refd)
Macaura v Northern Assurance Company, Limited, and others [1925] AC 619, HL (refd)
Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd [1994] 3 MLJ 569, SC (refd)
Mohamed Yusop bin Abdul Wahab v American Express (M) Sdn Bhd [2002] 6 MLJ 507; [2002] 7 CLJ 81, HC (refd)

Partizan Ltd v OJ Kilkenny & Co Ltd [1998] 1 BCLC 157, Ch D (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
Rookes v Barnard and others [1964] AC 1129, HL (refd)
Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors [1996] 3 MLJ 337; [1997] 2 AMR 2044, HC (refd)
Savant-Asia Sdn Bhd v Sunway PMI-Pile Construction Sdn Bhd [2009] 5 MLJ 754; [2008] 6 CLJ 681, FC (refd)
Vijendran a/l Ponniah v Bank of Commerce [1998] 7 MLJ 418; [1999] 5 CLJ 69, HC (refd)
Williams v Taylor (1829) 6 Bing 183 (refd)
Wong Cham Mew lwn Hong Leong Finance Bhd [1998] 2 MLJ 194, HC (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
Companies Act 1965 s 218, 281(1)(e), (2)(a)
Companies (Winding-Up) Rules 1972 r 19(b)
Co-operatives Act 1948 (repealed by the Co-operative Societies Act 1993)
Defamation Act 1957 s 11(1)
Stamp Act 1949 s 52

Ashok Kandiah (Kandiah Partnership) for the plaintiffs.
Cecil Abraham (S Satharuban, Sunil Abraham and Idza Hajar bt Ahmad Idzam with him) (Satha & Co) for the defendants.

Ramly Ali J:

[1] These grounds of judgment are in respect of two consolidated actions of Suit No D5–22–225 of 1995 ('D5 suit') and Suit No D4–22–224 of 1995 ('D4 suit').

[2] D5 suit was initiated by Semesta Insurance Undertaking Agency Sdn Bhd ('Semesta') against Koperasi Insurance (M) Bhd ('MCIS') while D4 suit was initiated by Santhanam Christie s/o Lourdes ('Christie') against the same defendant, Koperasi Insurance (M) Bhd ('MCIS'). Both the suits were filed on the same date — 8 May 1995.

[3] On 25 April 2003, both the suits were consolidated.

FACTUAL BACKGROUND

[4] Semesta is a private limited company incorporated in Malaysia and was at

the material time, carrying on business as insurance agent and consultant. MCIS is a co-operative entity incorporated under the Co-operatives Act 1948 and carries on the business of insurers. A

[5] On 30 March 1989, MCIS commenced legal action against Semesta vide Sessions Court Summons No 52–837 of 1989 for RM84,107.76 allegedly owed by Semesta to MCIS. On 16 May 1989, MCIS obtained a judgment in default against Semesta in that suit. B

[6] On 12 September 1989, the former shareholders of Semesta namely Ismail Omar, Sundralingam s/o Chinniah and Anthony Lakshmi Narayanan sold their shares to Santhanam Christie s/o Lourdes ('Christie'), Katijah binti Rosli, and Judy Louis. C

[7] The terms of the sale and purchase agreement for the shares state that a sum of RM80,817.60 is due and owing to Semesta. D

[8] On or around 27 September 1989, a deed of assignment was executed between Semesta and MCIS where Semesta assigned the said debt to MCIS. The deed of assignment has not been stamped to date. MCIS maintains that the deed of assignment is invalid and unenforceable. E

[9] On 31 December 1989, Semesta's underwriting agency licence expired. MCIS maintains that it supported Semesta's application for renewal of the licence. On 14 March 1990, Persatuan Insurans Am Malaysia ('PIAM') wrote to MCIS informing MCIS that Christie had contravened reg 8/16(ii) of the General Insurance Agents Registration Regulations ('GIARR') by being a corporate nominee, director and shareholder of two principals, namely Semesta and Associated Cover Sdn Bhd, at the same time. F G

[10] On 12 May 1990, MCIS internally circulated a memo stating its intention to cease business with Semesta as Semesta did not obtain the underwriting agency licence for the year 1990. Despite the internal memo, MCIS continued carrying on business with Semesta until October 1990. H

[11] Underwriting agency licences were phased out by PIAM by way of two circulars dated 12 September 1990 and 28 September 1990 respectively. I

[12] On 30 September 1991, MCIS issued a notice pursuant to s 218 of the Companies Act 1965 to Semesta. By 31 December 1991, Semesta was no longer a general insurance agent under PIAM.

[13] On 19 May 1992, MCIS proceeded to commence winding up proceedings vide Winding Up Petition No D6–28–172 of 1992 based on the judgment in default obtained.

[14] On 1 October 1993, the judgment in default was set aside by the sessions court on the ground of irregular service. In light of the setting aside of the judgment in default, the winding up petition was set aside on 1 November 1993. On 18 October 1994, the sessions court action was withdrawn with the liberty to file afresh.

[15] On 8 May 1995, Semesta commenced an action against MCIS vide Suit No D5–22–225 of 1995 (D5 suit) and Christie commenced action against MCIS vide Suit No D4–22–224 of 1995 (D4 suit). Both the suits were later consolidated.

D5 SUIT — SEMESTA'S CASE

[16] In the D5 suit, Semesta's claim against MCIS can be summarised as follows:

(a) that MCIS was negligent in obtaining the judgment in default and in instituting and/or advertising the winding up petition;

(b) that MCIS was negligent as:

(i) MCIS knew or ought to have known that PIAM would not allow Semesta to carry on the business of insurance agents for so long as Semesta was said or alleged to be indebted or having any other financial obligations to any of the insurance companies who were members of PIAM;

(ii) MCIS owed a duty of care to Semesta as Semesta was an agent of MCIS but had recklessly proceeded with the sessions court action on the basis Semesta was still indebted to it without carefully ascertaining whether Semesta was so indebted or not;

(iii) MCIS breached the duty of care owed to Semesta as it knew or ought to have known that at the material time that in order to carry out business with any company of insurers whether as ordinary or underwriting agent Semesta was required to be registered with PIAM, which registration is required to be renewed every two years and for so long as MCIS insisted that Semesta was indebted or having financial obligations to MCIS, no insurance company would be willing to allow Semesta to represent it as its agent;

(iv) MCIS knew or ought to have known that having withdrawn the said session court action, MCIS had to give Semesta a letter of

release stating that Semesta is not indebted to it to enable Semesta to conduct business with another insurer and to apply to PIAM for registration through that insurer, but failed and/or refused to issue the letter of release despite various and repeated requests from Semesta;

(v) MCIS recklessly, negligently and/or with total disregard to the well being of Semesta caused Semesta's underwriting agency licence not to be renewed by providing Semesta with a set of renewal forms that only related to ordinary agency licences despite having full knowledge of the correct set of renewal forms after being notified of the same by PIAM vide two PIAM circulars; and

(vi) MCIS proceeded with total disregard to Semesta's well being and potential damages suffered by Semesta, to cease all business transactions with Semesta with effect from 12 May 1990 on the premise that Semesta had not obtained an underwriting licence for the year 1990;

(c) that the judgment in default was obtained maliciously and unreasonably and amounts to malicious prosecution on the following grounds:

(i) MCIS effected irregular service of the summons in respect of the sessions court action even though they were in direct contact with officers of Semesta at the material time;

(ii) MCIS commenced the sessions court action despite having entered into the deed of assignment;

(iii) MCIS failed to disclose the existence of the judgment in default and Semesta only got to know of the same when a winding up notice was sent to it;

(iv) MCIS to date alleges that Semesta is indebted to MCIS without carefully ascertaining whether Semesta was so indebted or not;

(v) MCIS failed and/or refused to give Semesta the letter of release despite the judgment in default being set aside and the withdrawal of the sessions court action and no further action was recommenced in respect of the alleged indebtedness of Semesta; and

(vi) the wrongful filing and/or advertising of the winding up petition by MCIS without due care and consideration whether Semesta was in fact indebted or not; and

(d) that MCIS committed libel against Semesta by advertising the winding up petition in the newspaper.

[17] In the D5 suit Semesta prayed for the following reliefs:

(a) special damages at the rate of RM300,000 a year being loss of profits suffered by Semesta from 30 March 1989 and continuing;

(b)

(i) interest at the rate of 8%pa on the sum of RM300,000 from 30 March 1990 until the date of full settlement;

(ii) interest at the rate of 8%pa on the further sum of RM300,000 from 30 March 1991 until the date of full payment;

(iii) interest at the rate of 8%pa on the further sum of RM300,000 from 30 March 1992 until the date of full payment;

(iv) interest at the rate of 8%pa on the further sum of RM300,000 from 30 March 1993 until the date of full payment;

(v) interest at the rate of 8%pa on the further sum of RM300,000 from 30 March 1994 until the date of full payment;

(vi) loss of profits suffered by Semesta to be compensated by MCIS together with interest thereon at the rate of 8%pa from the date/s it becomes due;

(vii) general damages for libel amounting to RM15m together with interest thereon at the rate of 8%pa from the date it becomes due to the date of full payment;

(viii) punitive and exemplary damages of RM5m together with interest thereon at the rate of 8%pa from the date it becomes due to the date of full payment;

(ix) general damages for malicious prosecution together with interest thereon at 8%pa from the date it becomes due to the date of full payment;

(x) general and aggravated damages to be assessed together with interest thereon at 8%pa; and

(xi) cost of the suit.

D4 SUIT — CHRISTIE'S CASE

[18] Christie's claim in the D4 suit is almost identical to that of the claim pleaded by Semesta in the D5 suit. The following reliefs were prayed by Christie in the D4 suit:

(a) special damages at the rate of RM180,000 per year from 30 March 1990 until the date of full payment;

(b)
(i) interest at the rate of 8%pa on the sum of RM180,000 from 30 March 1990 till date of full payment;

(ii) further interest at the rate of 8%pa on the sum of RM180,000 from 30 March 1991 till the date of full payment;

(iii) further interest at the rate of 8%pa on the sum of RM180,000 from 30 March 1993 till the date of full payment,

(iv) further interest at the rate of 8%pa on the sum of RM180,000 from 30 March 1994 till the date of full payment;

(v) further interest at the rate of 8%pa on the sum of RM180,000pa commencing on the 1 January 1994 until full payment;

(vi) loss of profits to be compensated by MCIS together with interest thereon at the rate of 8%pa from the date/s it becomes due;

(vii) general damages and interest thereon at the rate of 8%pa from the date hereof until full satisfaction;

(viii) punitive and exemplary damages of RM5m together with interest thereon at the rate of 8%pa from the date it becomes due to the date of full payment;

(ix) general and aggravated damages to be assessed together with interest thereon at 8%pa from the date hereof; and

(x) costs.

ISSUES TO BE DETERMINED

[19] The issues to be determined in Semesta's claim in the D5 suit are as follows:

(a) whether MICS was negligent to Semesta in commencing the sessions court action and obtaining the judgment in default;

(b) whether Semesta's agency was wrongfully terminated by MCIS;

(c) whether the advertising of the winding up petition is defamatory of Semesta;

(d) whether the commencement of the session court action and the winding up proceedings by MCIS amount to malicious prosecution;

(e) whether MCIS was under a duty to provide Semesta with a letter of release;

(f) whether MCIS was under a duty to provide the correct forms for renewal to Semesta; and

(g) whether Semesta has proven its claim for loss and damage.

[20] The issues to be determined in Christie's claim in the D4 suit are as follows:

(a) whether Christie has any locus standi to commence action against MCIS for damage and defamation allegedly suffered by a company of which he is a corporate nominee, shareholder and director; and

(b) whether Christie has proven damage to his reputation and his claims for loss of income.

APPLICABLE LAW

[21] Semesta's claim against MCIS is mainly relies on the tort of negligence. The essential components of the tort of negligence are as follows:

(a) there must be in existence, a duty to take care which is owed by the defendant (MCIS) to the complainant (Semesta);

(b) there must have been a failure to attain that standard of care ie the breach of the duty of care; and

(c) there must have been damage, which is both causally connected with such breach and recognised by the law, suffered by the complainant (Semesta).

[22] One must take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to injure other persons who are so closely and directly affected by his acts or omissions that he ought reasonably to have them in contemplation as being so affected when he is directing his mind to the acts or omissions (per Lord Atkin in *M'Alister (or Donoghue) (Pauper) v Stevenson* [1932] AC 562 at p 580). This is the criteria in determining whether a duty of care is to be owed by one party to another.

[23] The criteria for impositions of duty of care are foreseeablity of damage, proximity of relationship and the reasonableness or otherwise of imposing a duty. In determining whether there was a relationship between the parties the court, guided by situation in which the existence, scope and limit of a duty of care had previously been held to exist rather than by a single general principle, would determine whether the particular damage suffered was the kind of damage which the defendant was under a duty to prevent and whether there were circumstances from which the court could pragmatically conclude that the duty of care existed.

[24] As to what constitutes a breach, the well known dictum of Baron Alderson in *Blyth v Birmingham Water Works Co* (1856) 11 Exch 781 at p 784 should be noted where the court stated:

> The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

[25] The damage suffered, must be one that is not too remote and the following principles should be taken into account:

(a) the damage will be too remote if it is not reasonably foreseeable;

(b) if the damage suffered is purely of pecuniary nature, then the defendant will be held liable to that extent which was reasonably foreseeable;

(c) if the damage suffered was either personal injury or injury to property, the defendant will be held liable for the full extent of the foreseeable kind of such damage, despite the fact that the way it happened or the extent of it, could not have been foreseen; and

(d) in cases of (b) and (c) the defendant is liable for foreseeable consequences only when they fall within the scope of the duty of which breach is made out.

RELATIONSHIP BETWEEN SEMESTA AND MCIS

[26] The act complained of by Semesta in the present suit is the commencing of the sessions court action by MCIS against it and subsequent obtaining of judgment in default in respect thereof; and the filing of the winding up proceedings against it by MCIS. The sessions court action was based on MCIS's claim that Semesta owed it a certain sums of monies and sought to recover the same. In that case, MCIS was the plaintiff and Semesta was the defendant. Relationship wise, they were litigants involved in a court proceeding.

DUTY OF CARE OWED TO LITIGANTS IN A COURT PROCEEDING

[27] Is there any duty of care owed by one litigant to another in a court proceeding? This court in of the view that no such duty of care exists. There is no duty of care owed by one litigant to another as to the manner in which the litigation was conducted, whether in regard to service of process or any other step in the proceedings, since the safeguards against impropriety in the conduct of litigation are to be found in the rules and procedures that controlled litigation rather than tortious remedies. Damage suffered by litigants caused by

the legal process instituted by another litigant (including winding up petition) are not remediable in an action based on negligence.

[28] The above principle was established by Scott J in the case of *Business Computers International Ltd v Registrar of Companies and others* [1987] 3 WLR 1134, where in that case the plaintiff's statement of claim was struck out on the ground that it disclosed no reasonable cause of action against the defendant. At p 1143 of the judgment, the learned judge went on to rule that:

> I take this passage from Sir John Donaldson MR's judgment as supporting the view that I have endeavoured to express, namely, that control of litigation and of the various steps taken in prosecuting litigation lies in the court and the rules and procedures that govern litigation and cannot be sought via tortious duty of care imposed on one party for the benefit of the other.
>
> This view is not, in my opinion, undermined but is reinforced by the facts of the present case. Mr Martineau has submitted forcefully that the plaintiff has been damnified, through no fault of his own, and that, on the plaintiff's pleaded case, the damage would not have happened had the second defendant exercised proper case in ascertaining the correct address of the plaintiff's registered office. All this I am prepared to accept. But the damage of which the plaintiff was caused by the legal process instituted by the second defendant and by the winding up order made by the court. Damage of this character is not, in my judgment, apt to be remediable in an action based on tortious negligence. In my judgment, there is no duty of care owed by one litigant to another as to the manner in which the litigation is conducted, whether in regard to service of process or in regard to any other step in the proceedings. The safeguards against impropriety are to be found in the rules and procedures that control the litigation and not in tort. I am therefore of the opinion that the plaintiff's statement of claim does not disclose a reasonable cause of action against the second defendant and ought to be struck out.

[29] The same principle was cited with approval by the House of Lords in a recent decision in the case of *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181, where Lord Roger of Earlsferry in delivering his judgment held at p 202:

> 47 I do not find the analogy compelling. When parties embark on contested court proceedings, even under the rules of procedure in force today they are entitled to treat the other side as opponents whom they wish to vanquish. So they do not owe them a duty of care: *Business Computers INternational Ltd v Registrar of Companies and others* [1988] Ch 229. Equally, when the parties employ solicitors and counsel to act for them in the proceedings, in general, those representatives owe no duty of care to the other side: *Al-Kandari v JR Brown & Co* [1988] QB 665 at p 675F–H per Bingham LJ …

[30] This court is of the view that no cause of action has in law for a mistake or negligent act done in court proceedings and that the only recognisable

causes of action in law are malicious prosecution and abuse of process. It is a well establish principle both with regard to civil and criminal matters that a person is not liable in damages for putting the law in motion unless he is actuated by malice. It is the right of everyone to put the law in motion if he does so with the honest intention of protecting his interests but it is an abuse of that right if he proceeds maliciously and without reasonable and probable cause for anticipating success (per Shaw J in *Chop Chye Hin Chong v Ng Yeok Seng* [1934] MLJ 265 at p 266).

[31] One party to an action does not owe a duty of care to the other, nor does his solicitor (see *Al-Kandari v JR Brown & Co (a firm)* [1988] 1 All ER 833; [1988] QB 665 at p 675F–H per Bingham LJ).

The reason is obvious: the duty to the other side might conflict with the duty to his own client (see Marritt LJ in *Elguzouli-Daf v Comr of Police of the Metropolis and another; McBrearty v Ministry of Defence and others* [1995] 1 All ER 833).

A mere negligence in the use of legal process cannot found an action in law. The only recognised actions in law would be that of malicious prosecution and the tort of abuse of the process of the court (per Abdul Malik Ishak J (as His Lordship was then) in the case of *Mohamed Yusop bin Abdul Wahab v American Express (M) Sdn Bhd* [2002] 6 MLJ 507; [2002] 7 CLJ 81).

[32] In the present case, there is no evidence adduced by Semesta to establish an act of malicious prosecution or an abuse of the process of the court on the part of MCIS in commencing the session court action against Semesta for the alleged debt claimed to be owed by Semesta to MCIS. Semesta's claim for the alleged negligence is not even a recognisable cause of action in law. The allegation of negligence in this regard is clearly devoid of merit.

[33] On the above principle, the court is satisfied that Semesta has failed to fulfill the very first requirement that forms the essence of an action founded on negligence: ie the existence of a duty of care. Thus Semesta's claim against MCIS can be dismissed at this stage.

BREACH OF THE DUTY OF CARE

[34] Even assuming the existence of a duty of care owed by MCIS to Semesta, the court shall now determine whether there have been failures to attain that standard of care in the breach of the duty of care (the second ingredient to establish the tort of negligence).

[35] The crux of Semesta's claim lies in its allegation of wrongful termination of its agency by MCIS. Semesta claims that the internal memo of MCIS dated

12 May 1990 serves as a termination of the agency. Semesta relies solely on the internal memo as the basis for the allegation for the termination of the agency. It is also not disputed that the internal memo was distributed internally (within MCIS) and was never served on Semesta.

[36] It is normal practice in cases of insurance agency that upon termination of an agency by an insurance company, the agent would be required to return the cover notes in the possession of the agent at the time of termination to the insurance company. However, on the facts of this case, there is no evidence which suggest that the cover notes were returned to MCIS in tandem with the purported termination. In this regard, the court finds no evidence to support that the agency was ever terminated by MCIS as alleged by Semesta and/or Christie, unless Semesta choose to unilaterally terminate the agency by itself.

[37] The said internal memo was dated 12 May 1990. Even assuming the said internal memo to be taken as a valid termination notice of Semesta's agency with MCIS, there are evidence by Christie himself that MCIS continued to carry on transacting insurance business with Semesta even after the purported termination notice, ie until October 1990 (five months after the alleged termination). Thus the claim of agency termination by MCIS is baseless and devoid of merit.

[38] Semesta, in its reamended statement of claim pleads that MCIS was under a duty to provide Semesta with a 'latter of release' stating that Semesta was not indebted to MCIS. Semesta further claims that the failure of MCIS in providing the letter of release resulted in the underwriting agency not being renewed by PIAM.

[39] In this regard, the court is of the view that MCIS is under no such duty to provide Semesta with the letter of release. Indeed Semesta has not produced before this court any document or evidence to show that such a duty is owed and that MCIS has undertaken and/or agreed to do so. PW3 was unable to point any regulation that requires an issuance of a letter of release on termination of agency. In any event, MCIS maintains to this day that Semesta is indebted to it for the sum of RM84,107.76. MCIS therefore could not possibly have issued the said letter of release.

[40] The court observes that even if an application for an underwriting agency was made by Semesta, prospects of the application being successful are unlikely, through no fault of MCIS failing to provide Semesta of the letter of release. PW5 in his evidence had indicated that if Semesta had made an application for underwriting agency licence, the fact that they have ceased all insurance underwriting operation would be a material consideration. PW5 also testified that another consideration for such an agency is that Semesta must

have a premium account of RM500,000. PW5 confirmed that there was nothing in Semesta's account to show the existence of the premium account of RM500,000 at the material time. The evidence of PW5 (at pp 6–7 of the notes of evidence dated 12 March 2007) are as follows:

> The company is basically insolvent and requires capital injection. Nothing to show about premium products of RM500,000.00. If the plaintiff applied for underwriting agency, these are the accounts they have to submit. Based on these accounts there is unlikely PIAM would grant plaintiff an underwriting agency licence, because of its insolvency.

[41] Further, the issue pertaining to the issuance of the release letter was only raised by Semesta in 1994 when Semesta was no longer an insurance agent and had ceased business. This issue is nothing more than an afterthought by Semesta.

[42] It was also alleged by Semesta that MCIS was negligent in failing to provide the correct forms for renewal of its underwriting licence. Semesta claims that MCIS only provided the forms for renewal of an ordinary agency and not that of an underwriting agency.

[43] Application for insurance agency licence (ordinary as well as underwriting) and its renewal must be made by the agent (in this case Semesta) to PIAM through the principal company (in this case MCIS) by using certain forms. In the present case, Semesta's agency licence (ordinary as well as underwriting) expired on 31 December 1991. As such application for renewal of the two licences has to be made by Semesta (as agent) to PIAM through MCIS, before the expiry date.

[44] Ordinarily, both applications for renewal of ordinary insurance agency license and underwriting insurance agency licence use different form, as testified by PW5. However, PW5 also testified that the form submitted by Semesta (which Semesta claimed was wrong for the purposes of renewing the underwriting agency licence) could infact be utilised for such application ie for renewing the underwriting agency licence. At p 5 of the notes of evidence on 12 March 2007, PW5 said: 'I agree there is nothing wrong for plaintiff (Semesta) to use this form for renewal of underwriting agency.'

[45] Is it the duty of MCIS (as principal) to provide correct forms to Semesta (as agent) for application for renewal of insurance agency licences to PIAM?

[46] PW1 (Christie) in his evidence, confirmed that 'the obligation to apply for licence is the plaintiff (Semesta) to be made through the defendant (MCIS) to PIAM.'

[47] A perusal of the General Insurance Agents Registration Regulations (issued by PIAM) (exh P5) clearly shows that there is no such duty imposed on MCIS as the principal. Semesta throughout the course of the trial has not been able to point out to this court to any provision of law that imposes such duty on MCIS. PW5 confirmed in his evidence that 'it is the duty of the plaintiff (Semesta) to ensure a correct form is used by him (Semesta) when he applied to PIAM through on appropriate insurance company' (p 3, notes of evidence of 12 March 2007). DW1 had also testified (p 2, note of evidence of 9 September 2009), that 'it is the duty of the agency to clarify with the principal company to ensure they apply in the correct form'.

[48] The standard procedure in making such application to PIAM, is that the agent (Semesta) has to file the appropriate application forms to PIAM through the principal (MCIS). This is not disputed. In this respect, MCIS as the principal merely acts as an intermediary or medium in submitting the forms on behalf of Semesta as PIAM would not deal directly with insurance agents such as Semesta. Under such circumstances, the court finds that MCIS was not under a duty be it statutory or in common law to provide the correct form to Semesta. At the end of the day, Semesta is wholly responsible in making the necessary inquiries about which forms to be used for the purpose. Christie (PW1) being an experienced and prominent figure in the insurance industry should or ought to have known that wrong forms were executed by him for the purpose.

[49] It must also be noted that with effect from 31 December 1991, the underwriting agency licences were phased out by PIAM by way of two circulars dated 12 September 1990 and 28 September 1990. This is not disputed. Christie (PW1) knew about that. At p 9 of the notes of evidence of 28 November 2005, PW1 admitted during cross-examination:

> The obligation to apply for licence is plaintiff — to be made through the defendant and to PIAM. Underwriting licences were phased out by 31.12.1991. Therefore I would not be able to do underwriting business after 31.12.1991 even I would want to do so.

[50] The irresistible conclusion to be drawn is that Semesta would not be able to carry on with any underwriting insurance business after the phasing out even if it wanted to. Thus, the question whether correct or wrong forms were used for the application to renew the underwriting licence at the material times is no more relevant. It does not help Semesta in its claim on this issue.

WHETHER THE SESSIONS COURT ACTION AND WINDING UP PROCEEDINGS AMOUNTS TO MALICIOUS PROSECUTION

[51] Semesta claims that the judgment in default in respect of the sessions

court action filed by MCIS against Semesta, was obtained maliciously and unreasonably and amounts to malicious prosecution (the grounds for such claim are as stated in para 16(c) of these grounds of judgment).

[52] The elements that need to be proven by a plaintiff in an action for malicious prosecution are set out in 45 *Halsbury's Laws of England*, (4th Ed), para 490 which states as follows:

> 490. Malicious civil proceedings generally. In civil proceeding which result in damage to reputation, person or property a claim analogous to the claim for malicious prosecution may lie if those proceedings are undertaken maliciously and without reasonable and probable cause. Only in exceptional circumstances wills such a claim succeed, because generally no damage can be proved.

[53] With respect to malicious institution of winding up proceedings, para 493 (of the same book) provides that:

> A claim may be brought in respect of injury to reputation caused by maliciously and without reasonable and probable cause commencing bankruptcy proceedings against an individual or winding up proceedings against the company provided that the proceedings terminated favourably to the claimant.

[54] To be actionable as a tort the action taken by the defendant must have been without reasonable and probable cause, must have been instituted or carried on maliciously and have been terminated in the plaintiff's favour. The plaintiff must also prove damage (see *Halsbury's Laws of England*, Vol 45, (4th Ed), para 1340; *Vijendran a/l Ponniah v Bank of Commerce* [1998] 7 MLJ 418; [1999] 5 CLJ 69; *Lim Chee Kuo v The Pacific Bank Bhd* [1997] MLJU 472; [1999] 1 CLJ 270).

[55] Hence, in the present case, Semesta must prove the following ingredients in order to establish its claim for malicious prosecution on MCIS:

(a) the session court action and the winding up proceedings against Semesta has commenced and terminated infavour of Semesta;

(b) there is malice on part of MCIS in instituting those action/proceedings;

(c) there is an absence of reasonable and probable cause; and

(d) Semesta as the plaintiff must have suffered damage.

TERMINATION OF THE SESSIONS COURT ACTION/WINDING UP PROCEEDINGS: WAS IT IN FAVOUR OF SEMESTA?

[56] From the evidence adduced throughout the trial, the following facts are established and not disputed:

(a) the sessions court action was commenced by MCIS against Semesta on 30 March 1989 based on the alleged debts of RM84,107.76 owed by Semesta to MCIS;

(b) on 16 May 1989, MCIS obtained a judgment in default against Semesta;

(c) the winding up proceeding was commenced by MCIS against Semesta on 19 May 1992 based on the said judgment in default obtained;

(d) the said judgment in default was later set aside due to irregular service;

(e) the winding up proceeding was later dismissed by the court upon setting aside of the judgment in default; and

(f) the sessions court action was withdrawn before ever going to trial with liberty to file a fresh.

[57] What is clear from the undisputed facts above are as follows:

(a) The merits of the sessions court action was never adjudicated upon as it never went to full trial.

(b) The merits of the winding up proceeding was never adjudicated upon. It was set aside simply due to the fact that the very basis on which it was instituted (the judgment in default) is no longer present.

[58] The essential determination in the cause of action for malicious prosecution in the present situation is whether the sessions court action and winding up proceeding had terminated in favour of Semesta? If there is any termination in favour of Semesta (as the plaintiff) the action/proceeding must have been litigated.

[59] In the present case, the court finds that (based on the undisputed evidence) there has been no determination of either the sessions court action or the winding up proceeding. Both the sessions court action and the winding up proceeding were not litigated at all. Thus their termination by the court cannot be relied upon by Semesta to support its claim for malicious prosecution. Semesta has failed to satisfy this court of the first element to succeed in an action for malicious prosecution.

WHETHER THERE IS MALICE AND LACK REASONABLE AND PROBABLE CAUSE

[60] What amounts to such a combination of malice and lack of reasonableness and want of probable cause is so much a matter of fact in each individual case as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused (see *Williams v Taylor* (1829) 6 Bing 183).

[61] What is the meaning of 'reasonable and probable cause' in the context of legal proceedings?

[62] Hawkins J in *Hicks v Faulkner* (1878) 8 QBD 167 at p 171 (as cited by Lord Atkin in *Herniman v Smith* [1938] AC 305 at p 316) defined the phrase as follows:

> I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. It is well settled that the question of the absence of reasonable and probable cause is for the judge. At the same time it is, I think, clear that the question is one of fact and not law.

[63] The pertinent facts with regards to the sessions court action and the winding up proceeding in the present case were set out earlier (in para 51 of these grounds of judgment). The fact that the judgment in default and the winding up proceeding were later set aside does not mean that the institution of the action and proceeding was without reasonable and probable cause. The institution of the sessions court action and obtaining of a judgment in default against Semesta was founded on MCIS's genuine claim of unsatisfied debt by Semesta. The winding up proceedings was initiated on a judgment in default which was still in force at the material time when the proceeding was instituted and not satisfied by Semesta. At the material time MCIS had an honest belief founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and caution man, placed in the position of MCIS, to the conclusion that Semesta was indebted to MCIS and MCIS had a valid claim against Semesta for recovery of the debt in question. MCIS maintains to this very day that the debt is still due and owing by Semesta to MCIS. It is within MCIS's right to utilise the available avenues to recover the debt due and owing, which includes the commencement of legal proceedings in court of law.

[64] The burden of Semesta as the plaintiff in order to establish its claim in this case is very clear. Brett MR in *Abrath v The North Eastern Railway Company* (1883) 11 QBD 440 (at pp 448–449) had clearly explained the issues as follows:

> The points, which it is necessary for the plaintiff to substantiate in order to make out his claim, are not really in doubt: they have been decided over and over again, and have been decided for more than one hundred years; it is not enough for the plaintiff to shew, in order to support the claim which he has made, that he was innocent of the charge upon which he was tried; he has to shew that the prosecution was instituted against him by the defendants without any reasonable or probable cause and with a malicious intention in the mind of the defendants, that is, not with the mere intention of carrying the law into effect, but with an intention which was

wrongful in point of fact. It has been decided over and over again that all these points must be established by the plaintiff, and that the burden of each of them lies upon the plaintiff.

[65] No doubt, at the end of the day, MCIS failed in its attempt to recover the debt and to get Semesta wound up through the sessions court action and the winding up proceeding against Semesta, but 'the fact that a claim ultimately fails does not mean there were not reasonable grounds for making it in the first place, let alone that the maker of the claim (MCIS) did not genuinely believe that he had such grounds. The decision of the courts are not always predictable' (per Rimer J in *Partizan Ltd v OJ Kilkenny & Co Ltd* [1998] 1 BCLC 157).

[66] The judgment in default obtained by MCIS against Semesta in respect of the sessions court action, stands as a good judgment and enforceable until set aside. When a judgment sum is not paid then execution can be enforced. This can take the form of winding up proceeding, if the judgment debtor is a company, as is the case here. There is no sinister reason for this approach adopted by MCIS (see *Vijendran a/l Ponniah v Bank of Commerce*).

The judgment sum was not paid by Semesta after the issuance of the 218 notice to Semesta. Under s 281(1)(e) of the Companies Act 1965, Semesta was deemed to be 'unable to pay its debts' and a petition for winding up can be presented against Semesta.

[67] Semesta has pleaded that there was in fact no sum due and owing by Semesta to MCIS and even if there was, it was settled by virtue of the deed of assignment that was entered into between Semesta and MCIS on 27 September 1989. It would seem that Semesta is stating that it has a defence to the sessions court action.

[68] The said deed of assignment has not been stamped to date. As such it cannot be admitted into evidence pursuant to s 52 of the Stamp Act 1949. The said deed of assignment is also invalid and unenforceable as the debtors set out in the schedule of the deed of assignment was not served with a notice in writing of the assignment. As such the deed of assignment runs contrary to the law as set out in s 4(3) of the Civil Law Act 1956. Notice of the assignment to the debtors is a mandatory requirement (see *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esrue Osman & Ors* [1987] 1 MLJ 502 at p 510).

[69] MCIS maintains that there is a debt due and outstanding from Semesta to MCIS. Despite the execution of the deed of assignment, the debtors listed in the deed of assignment particularly, debtors Nos 1, 2, 3 and 6 denied owing any money to Semesta. The court is of the view that if the debtors set out in the deed of assignment dispute the debt or deny owing any money to Semesta, then

there is no debt to assign. Therefore, the fact the debtors had disputed or denied owing any money to Semesta goes to show that there is no debt to assign and Semesta is still indebted to MCIS.

[70] During trial Semesta was trying to show to the court that it has good defence in the sessions court action. However the court is of the view that the issue is not relevant at this stage of the proceedings before this court. MCIS owes no duty to Semesta to ensure whether a defence to the claim exists or otherwise. This was succinctly stated in *Herniman v Smith* at p 319:

> It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable cause for a prosecution.

[71] Accordingly, the court finds that the issue raised by Semesta with regards to deed of assignment is baseless.

[72] Premised on the facts and the law, the mandatory requirements upon which a claim for malicious prosecution is founded are not apparent in this instant case. The mere fact that an action has been dismissed or withdrawn does not ipso facto give rise to a cause of action in malicious prosecution. Semesta has failed and/or neglected to expressly plead any particulars of malice. On the pleadings itself, Semesta has clearly failed to plead any 'real' particulars of malice in its attempt to mount a claim for malicious prosecution. The mere recital of court proceedings before the sessions court in so far as the winding up petition is concerned does not amount to a prima facie plea of malice.

[73] Accordingly, for the reasons set out above, the court finds that Semesta's claim for malicious prosecution against MCIS must fail.

WHETHER ADVERTISING OF THE WINDING UP PETITION WAS DEFAMATORY OF SEMESTA

[74] In its statement of claim, Semesta had pleaded that MCIS committed libel against it by advertising the winding up petition in the newspaper. Thus Semesta claims, inter alia, general damages for libel amounting to RM15m together with interest thereon at the rate of 8%pa from the date it becomes due to the date of full payment.

[75] The gist of Semesta's claim on this matter (as found in its' statement of claim) is the advertisement of the winding up petition in the newspaper. The advertisement relates to publication of the winding up petition in the newspaper (as alleged by Semesta). It is settled law for a cause of action in libel to be maintained there must be publication to a third party.

[76] On the evidence before the court, Semesta has failed to prove on the balance of probabilities that the winding up petition was advertised in the newspaper as claimed in the statement of claim. MCIS from the very outset, maintained that no such advertisement was made of the winding up petition in the newspaper as alleged by Semesta.

[77] The court finds no evidence adduced by Semesta to support its allegation on the issue of advertisement in the newspaper. PW1 (Christie) in his evidence before the court has the followings to say on the subject matter:

> I don't know which newspaper the winding-up petition was advertised. I don't have any copy of the advertisement I don't know which newspaper these advertisements were published.
>
> I agree with these two answers. I have seen the advertisement I don't have any evidence to show that the advertisement was published. I cannot produce any advertisement from any newspaper.

[78] Semesta's own witness PW1 (Christie himself) had indicated in his own evidence above that there is no evidence of publication of the winding up petition in any newspaper. It is settled law for a cause of action in libel to be maintained, there must be publication. This mandatory element is not present in this instance. Reference is made to *Gatley on Libel and Slander*, (10th Ed) at p 141, para 6.1 which reads, as follows:

> General principle: publication. No civil action can be maintained for libel or slander unless the word's complained of has been published. 'The material part of the cause of action in libel is not the writing, but the publication of the libel.' In order to constitute publication, the matter must be published to (communicated to) a third party, that is to say, at the least one person other than the claimant. 'A cannot sue B for defaming him to A himself, or to B himself; that is to say where B reads to himself his libel on A then locks it away. A must prove that B defamed him to C …'

[79] Even assuming the winding up petition was duly advertised in the newspaper, the court is of the view that it is not defamatory of Semesta as the advertisement of the winding up petition is a mandatory requirement under r 19(b) of the Companies (Winding-Up) Rules 1972 and is therefore absolutely privileged.

[80] Rule 19(b) of the Companies (Winding-Up) Rules 1972 provides as follows:

> 19 Advertisement in the Gazette
>
> Unless otherwise expressly provided in these Rules or otherwise expressly ordered:
>
> (a) ...

(b) all matters which require to be advertised shall be published once in a local newspaper.

(Rule 19(b) uses the connotation 'shall' which is mandatory in nature).

[81] The advertisement of the winding up petition is an absolute privilege which shall be protected under s 11(1) of the Defamation Act 1957. In any case, the winding up petition was based on the deemed insolvency of Semesta under s 218(1)(e) read together with s 218(2)(a) of the Companies Act 1965. It arose out of Semesta's failure to pay its debt within 21 days from the service of demand on it. Therefore, Semesta could not argue that it was able to pay its debt, because under the Companies Act 1965 Semesta was deemed to be unable to pay its debts by its own failure to comply with the demand, (see Federal Court decision in *Savant-Asia Sdn Bhd v Sunway PMI-Pile Construction Sdn Bhd* [2009] 5 MLJ 754; [2008] 6 CLJ 681).

[82] The Federal Court in the above case (*Savant-Asia*) adopted and followed the decision of Devlin LJ in *Lincoln v Daniels* [1962] 1 QB 237, where it was held:

> The absolute privilege which covers proceedings in or before a Court of Justice can be divided into three categories. The first category covers all matters that are done coram judice. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings.

(see also *Burr v Smith and others* [1909] 2 KB 306, *Wong Cham Mew lwn Hong Leong Finance Bhd* [1998] 2 MLJ 194 and *Anne Lim Keng See v The News Straits Time Press (M) Bhd & Anor* [2003] 2 CLJ 565).

[83] The law on this matter is crystal clear on this point. The advertisement of the winding up petition in this case (if there was such an advertisement) enjoys absolute privilege in law and cannot form the basis of Semesta's claim in libel against MCIS. In the circumstances, Semesta's claim premised on a cause of action in defamation is misconceived and devoid of merit. There is not legal or factual basis to support Semesta's claim premised on such a cause of action.

D4 SUIT — CHRISTIE'S CASE

Christie's locus standi to commence action in his personal capacity

[84] Christie's pleaded claim in the D4 suit is identical to that of Semesta's claim in the D5 suit. The question that begs determination would be whether

Christie can put forth a claim in his personal capacity as a corporate nominee, shareholder and director for damage allegedly suffered by Semesta.

[85] The law is trite that a company is a totally separate and distinct entity to that of its directors and shareholders. The House of Lords in the case of *Aron Salomon (Pauper) v A Salomon and Company, Limited* [1897] AC 22 established the now famous principle that a company is a legal entity separate from its corporators and that, as a matter of law, the parties thereto are divided by what is now known as the 'corporate veil'.

[86] A company must be treated as a separate person to that of its participants. Therefore the company's obligation and liabilities are entirely its own and not those of its participants. Thus, when a company incurs a contractual obligation or a liability in tort, that obligation or liability is that of the company and not of its members or officers.

[87] A company can sue and be sued in its own name. Being a separate legal entity, the company may enforce its rights by suing. It can definitely incur liabilities and be sued by other parties (see *Foss v Harbottle* (1843) 2 Hare 461 where the court held that as a separate person in law, a company must enforce its rights by itself in its own name).

[88] A company's property is not the property of its participants. By virtue of the separate entity rule, a company may own property distinct from the property of its own members; and a company can enter into a contract with its controlling participants.

[89] The only conclusion one can arrived at based on the above situation is that Christie cannot put forth a claim in his personal capacity as a corporate nominee, shareholder and director for damage allegedly suffered by Semesta. If Semesta has indeed suffered damage, then it is for Semesta in its own capacity as a separate legal entity to commence action for the damage not Christie.

[90] This cardinal principle of company law was established in *Aron Salomon (Pauper) v A Salomon and Company, Limited* and exemplified in *Macaura v Northern Assurance Company, Limited, and others* [1925] AC 619, where Lord Buckmaster said:

> Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.

[91] Christie's pleaded claim against MCIS in the D4 suit is, inter alia, for

negligence on the part of MCIS for commencing the sessions court action and the winding up petition against Semesta; negligence for failing to provide Semesta with the letter of release; and negligence for allegedly providing Semesta with the wrong set of forms for the renewal of Semesta's underwriting agency licence.

[92] The court is of the view that the allegations for negligence (which are devoid of merit) were clearly in relation to Semesta. Christie as a shareholder, director and corporate nominee does not have an independent cause of action separate and distinct from Semesta and hence has no standing and/or the capacity to sue MCIS for negligent acts suffered by Semesta at all. On this basis alone, Semesta's claim for negligence falls in its entirety (see *Koo Hock Chum & Anor v United Overseas Bank (M) Bhd* [2009] 2 CLJ 331).

[93] Lord Bingham in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 stated the applicable principle is that where a company suffers a loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other.

[94] In the present case, Christie's pleaded claim clearly shows that the alleged negligence committed by MCIS is in relation to Semesta's interest, not his personal interest. The alleged negligence for commencing the sessions court action and the winding up petition relates to Semesta as a company, not Christie. The alleged negligence for failing to provide Semesta with the letter of release, also relates to Semesta as a company, not Christie. The alleged negligence for providing Semesta with the wrong set of forms for the renewal of Semesta underwriting licence, also relate to Semesta as company, not Christie.

[95] Thus, Christie in this case lacked standing to sue because the damage if any was suffered by Semesta as a company, not himself. Semesta's loss or damage is not that of Christie (see *Macaura v Northern Assurance Company, Limited, and others*; *Koo Hock Chum & Anor v United Overseas Bank (M) Bhd*. Thus, Christie's claim against MCIS in the D4 suit must also fail.

WHETHER SEMESTA AND CHRISTIE HAS PROVEN DAMAGES

[96] In its statement of claim, Semesta claims for special damages of RM300,000pa for loss of profits; general damages of RM15m for libel; punitive and exemplary damages of RM5m; general damages for malicious prosecution and general and aggravated damages to be assessed.

[97] Christie, on the other hand, claims for special damages of RM180,000pa for loss of income; punitive and exemplary damages of RM5m, and general and aggravated damages to be assessed.

LAW OF DAMAGES

[98] The law with regards to damages is trite. In *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177 at p 178 it was held:

> ... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages.' They have to prove it.

The dictum above was referred to and applied by the Court of Appeal in *John v Dharmaratnam* [1962] MLJ 187.

[99] In the case of *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 at p 367 Edgar Joseph Jr J had occasion to say as follows:

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right.

[100] In *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569 at p 582E–F, Mohamed Dzaiddin SCJ, speaking for the Supreme Court, quoted, with approval, the above passage in *Popular Industries* case.

SEMESTA'S ALLEGED LOSS OF PROFIT

[101] In the present cases, Semesta and Christie relied solely on an actuaries report ('P11') prepared by one Muhammad Jamalul Alam @ Jeffery Zain ('PW8'). MCIS on the other hand, relied on another actuaries report ('D13') prepared by one Zainal Abidin Mohd Kassim ('D2'), to rebut the report prepared by PW8.

[102] The report (P11) was prepared by PW8 based on the first four months of 1990 and that Semesta only transacted for four months. The court finds that in 1990, Semesta was an extremely small business. The court also finds that the entire basis of the calculation or projection of loss and profit in the report (P11) is erroneous, baseless and too speculative. PW8 based his entire projection of loss and pre-tax profits on the industry growth assumption. The estimation

should instead be based on the premium growth of MCIS itself as opposed to the growth of the industry at large. PW8's industry premium growth assumptions cannot be taken as a benchmark as it would lead to an inaccurate estimation of the commission earnings.

[103] By projecting commission growth using an assumed premium growth assumption, the report (P11) assumes that the commission structure in 1990 will continue unchanged, despite the general reduction in commissions and the abolishment of overriding commission in 1992.

[104] It is clear from the history of the commission earned by the insurance agent would vary from year to year depending on various factors, for example it could significantly change with the business environment.

[105] MCIS's premium growth was below the overall industry growth in ten years out of 16 years based on its published financial account as opposed to the report (P11) which was prepared by PW8 based on the annual reports of the Director General of Insurance as well as PIAM annual reports. DW2 in his reports (tendered as MCIS's evidence) had clearly set out a comparison table to show the differences between the premium growth of MCIS and the whole of the insurance industry. It is evident from the said comparison table that the premium growth rate of MCIS was substantially lower that the industry's premium rate. The court finds that the projection in P11 (prepared by PW8 for Semesta) was based on the unrealistic assumption that the commission earnings in 1990 would continue unchanged dispute. The general reduction of commission and the abolishment of overriding commission in 1992. On this point alone, this court may disregard the report P11.

[106] Despite the glaring evidence and trend of the commission earnings, PW8 failed to take into account all the factors despite agreeing that the earning of commission had generally dropped in year 1992 wherein, nowhere in his report (P11) was such an allowance explicitly made and the fact that MCIS had generally underperformed in comparison of the industry as a whole.

[107] PW8 in his oral testimony in court agreed that of the commission is reduced by 25% an agent in order to achieve the same amount of commission had to sell premiums four times higher than what were sold earlier. Nevertheless, PW8 failed to take into account this important factor in preparation of his report (P11). Had PW8 considered these factors into account, he would not have concluded P11 in the manner in which it is concluded now.

[108] Another glaring inconsistency in the report P11 is the agency expenses which did not increase or commensurate with the increase in the sales and commission earned. P11 shows that the number of clerical staff increased from one to four over a time period of 15 years. More importantly, from the period 1991 to 2006, P11 shows that productivity increased 15 fold but is dependent on just one sale staff and no increment of remuneration was contemplated in tandem with the performance of the sales staff in light of substantial increment in productivity. This is again highly improbable and no allowance was made for the increase of staff. P11 also did not take into account capital expenses for example, purchase of additional computers and office appliances in light of the increase in productivity and revenue.

[109] The report P11 also failed to take into account the reduction in tariffs in respect of fire house owner insurance in general insurance industry wherein the premium payable in respect of the same was reduced. Correspondingly, the commission earned reduced accordingly. Had this factor taken into account, the projection in P11 would be reduced accordingly as P11 assumes that the tariff would remain unchanged.

[110] It also be noted that if Semesta wishes to renew its underwriting agency licence, it must generate an annual gross premium of RM500,000 otherwise it is unlikely that PIAM would grant Semesta an underwriting agency licence. PW5 had under cross-examination having the benefit of perusing Semesta financial statements confirmed that Semesta was nowhere near the RM500,000 mark to be a licensed underwriting agent. Upon perusing the financial report for the period of 30 April 1990, PW5 gave evidence that Semesta was basically insolvent and requires capital injection and nothing to show that they have generated annual gross premium of RM500,000. All these important factors are not addressed in P11 rendering P11 highly inaccurate, overstated and unreliable.

[111] The court finds that DW2 had in his report (tendered by MCIS) set out a more realistic projection by taking into account all the relevant factors and more importantly it was based on MCIS's premium growth. D13 is not an independent report but a report based the report P11 with proper adjustments and modifications to make it more realistic. This estimation can be seen at p 8 of D13. Upon proper adjustments and modification the projected loss of earnings of Semesta together with interest was reduced from RM3,895,915 to RM12,170.

[112] DW2 had also given evidence in court that the reason of the difference in value of projection was due to P11's failure to the take into account relevant allowance for reduction and various other factors as set out in section 4 of the addendum to D13.

[113] DW3, a charted accountant, had reviewed the report P11 prepared by PW8. DW3 had given evidence in court that the assumptions made by PW8 in respect of the projected income may not be achievable or accurately assumed for the following reasons:

(a) No detailed breakdown or specific source of revenue was made available in P11 to justify the projection arrived at.

(b) No mention of the existence of specific clientele, existing policies, business expansion programme, market positioning or targeted market.

(c) There is no tangible business plan or model in place to grow and no indication as to how the RM1,000 growth rate is to be secured or maintained.

(d) The projection of profits made in P11 are subjective or highly unlikely given the past historical track record of Semesta's revenue wherein Semesta only achieved pre-tax profits of approximately RM900 and RM8,000 based on the operating revenue of RM22,000 and RM52,000for the financial years 1990 and 1989.

(e) The business and projection of profits of Semesta would be adversely affected by the cessation of issuance of underwriting license by Bank Negara Malaysia effective from 31 December 1991.

(f) No allowance made for increase in the man power, operating expenses such as office rental or marketing expenses to generate higher income. No allowance made for impact of economic conditions for example, the Asian Financial Crisis which would seriously impact the said projection.

[114] Based on the report D13 and the evidence adduced by DW3 in court. The court is satisfied and concludes that the very methodology adopted by PW8 in preparing his report (P11) which was based on the industry premium growth is flawed; and the methodology was not suitable to project Semesta's alleged loss of profits.

[115] D13 prepared by DW8 on the other hand is more realistic and well justified whereby all the relevant factors, allowances expenses and market conditions are taken into account. Therefore, the court should rely on D13 as opposed to P11. Thus the court is satisfied that on the balance of probabilities Semesta as well as Christie have failed to adduce sufficient evidence to support their claims for loss of profits.

A DAMAGES FOR LIBEL

[116] In relation to the alleged libel against Semesta, Semesta claim for RM5m against MCIS. The court finds that the damages sought is unsupported, unreasonable and exorbitant.

B

[117] In any event, this court had earlier found that (para 83 of these grounds of judgment) Semesta's claim premised on a cause of action in defamation (libel) is misconceived and devoid of merit. Therefore, the issue of damages suffered under the said cause of action does not arise.

C

CHRISTIE'S ALLEGED LOSS OF INCOME

[118] In his statement of claim, Christie prays for special damages of RM180,000pa for loss of income.

D

[119] The court had earlier found (para 94 of these grounds of judgment) that 'Christie in this case lacked standing to sue because the damage if any, was suffered by Semesta as a company, not himself. Semesta's loss or damage is not that of Christie. Thus Christie's claim against MCIS in the D4 suit must also fail'. That being the case, the issue of damages suffered by Christie does not arise at all. Christie's claim is therefore completely baseless and should be dismissed.

E

F PUNITIVE AND EXEMPLARY DAMAGES

[120] In both the D4 and D5 suits, both Semesta and Christie claim for a sum of RM5m each as punitive and exemplary damages against MCIS.

G

[121] The objective of an award under this category is to punish the defendant and to display the court's indignant attitude towards the acts committed by the defendant (see *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337; [1997] 2 AMR 2044 at p 2046).

H

[122] In the case of *Rookes v Barnard and others* [1964] AC 1129 at p 1227, it was held:

> ... I wish now to express three considerations which I think should always be borne in mind when awards of exemplary damages are being considered. First the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in exemplary damages would become an

I

absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence. Secondly the power to award exemplary damages constitutes a weapon that while it can be used in defence of liberty, as in the *Wilkes v Wood* (1763) Lofft 1, can also be use against liberty. Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be incurred if the conduct were criminal and moreover a punishment imposed without the safeguard which the criminal law gives to an offender. I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint.

[123] It was further held in *Rookes v Barnard and others* that the three categories under which exemplary damages can be awarded is as follows:

(a) where there is oppressive, arbitrary or unconstitutional action by a government servant;

(b) if the conduct of the defendant is calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiffs; and

(c) where exemplary damages are authorised by statute.

(See also *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76 at p 91; *Cassell & Co Ltd v Broome and another* [1972] 1 All ER 801 at p 849; and *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 at pp 422–423).

[124] In the present cases (D4 and D5 suits) the only way Semesta and Christie can justify seeking an award for punitive and exemplary damages is to show that they fell into any one of these three categories. The court finds that nothing was pleaded by either Semesta or Christie nor was any evidence led that could remotely fall under any of the categories above. As such their claim for punitive and exemplary damages must fail.

GENERAL DAMAGES FOR MALICIOUS PROSECUTION

[125] As earlier stated in these grounds of judgment, Semesta's cause of action under malicious prosecution against MCIS falls short of the requirements and is completely baseless. Thus, Semesta's claim for damages should automatically fall.

CONCLUSION

[126] Based on the above considerations the court is satisfied that both Semesta (in D5 suit) and Christie (in D4 suit) have failed to establish their

claims against MCIS on the balance of probabilities. Therefore, both the D5 and D4 suits against MCIS are dismissed with costs.

Both suits dismissed with costs.

Reported by Kohila Nesan